IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

FIRST APPEAL No 7288 of 1999

With

FIRST APPEAL No. 318 of 2000

For Approval and Signature:

Hon'ble MR.JUSTICE H.R.SHELAT

and

Hon'ble MR.JUSTICE H.H.MEHTA

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : YES

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? :

FIRST APPEAL NO. 7288 OF 1999

NEW INDIA ASSURANCE CO.LTD.

Versus

MUNA MAYA BASANT W/O SHER BAHADUR BASANT

Appearance:

MR PV NANAVATI for the appellant.

MR SURESH M SHAH for the Respondent No. 1

NOTICE UNSERVED on Respondent No. 2

With

FIRST APPEAL No. 318 of 2000

NEW INDIA ASSURANCE CO LTD

Versus

BHURABHAI VAGHABHAI HAVZARIA B/O LATE KARSHANBHAI

Appearance:

MS LILU K BHAYA for the Petitioner

CORAM : MR.JUSTICE H.R.SHELAT

and

MR.JUSTICE H.H.MEHTA

Date of decision: 9/02/2001

JUDGEMENT : (Per: H.R. Shelat, J.)

These two appeals are directed against the orders passed by the Motor Accident Claims Tribunal at Bhuj awarding compensation as per structured formula under Sec. 163-A of the Motor Vehicles Act, 1988, (for short `the Act').

2. In these two appeals, common questions of law & facts are raised. With a view to avoid waste of time, hardships to the parties, and conflicting judgments, we have preferred to hear the appeals together and dispose the same of by a common judgment. Accordingly, the appeals are heard and by this common judgment all the three appeals shall stand disposed of.

3. Vir Bahadur, the son of Sher Bahadur and opponent No.1, was going from Kandla to Indore driving the tanker No. GJ-12-T-7723. Tek Bahadur was the cleaner on the tanker. Vir Bahadur was driving the tanker cautiously remaining on the left side of the road and at the moderate speed. On 15th July 1996 at 1.30 p.m. he reached Ghatpir on Dahod-Godhra road. He was negotiating the curve on the bypass road. The tanker suddenly went off the southern side of the road and turned turtle. Vir Bahadur sustained serious injuries and succumbed to the same at the spot. Vir Bahadur was earning Rs. 5,500/= per month. He was aged 25 years. The opponent No.1, who is the mother of deceased Vir Bahadur, then filed M.A.C.P. No. 171 of 1997 in the Motor Accident Claims Tribunal, Kuchchh at Bhuj under Section 163-A of the Act for compensation as per structured formula. The then

learned Chairman of the Tribunal hearing the parties on 15th September 1999 passed the order directing the appellant and opponent No.2 (the insurer and insured) to pay Rs. 4,12,500/= together with interest at the rate of 12% p.a. and costs in proportion against the total claim of Rs. 4,89,500/=. The Insurance Company has therefore preferred First Appeal No. 7288 of 1999.

4. Karsanbhai Vaghabhai aged about 30 years was serving as driver. He was earning Rs. 42,000/- p.a. On 4-9-1997 he was going from Kandla to Hyderabad driving the tanker No. GJ-12-V-5175 loaded with chemicals. The respondent No.3 was the owner of the tanker. At 18.00 hours Karsanbhai reached near the mile stone on Halvad-Dhrangadhara Road indicating that village Kavandia was 18 Kms. away. At that time a truck bearing No. GJ-12-U-6795 came from the opposite direction. The driver of that truck was rash & negligent in driving the truck. He went on the wrong side and collided against the tanker as a result Karsanbhai sustained injuries to which he succumbed at the spot. The brother and widow of the deceased Karsanbhai filed M.A.C.P. No. 810 of 1997 in M.A.C. Tribunal (Auxi.) Kachchh at Bhuj for compensation of Rs. 4,63,000/- as per second schedule under Sec. 163-A of the Act against respondent No.3 and the appellant (ori-opponents Nos. 1 & 2 respectively). The Tribunal on 22.12.99 passed the award for Rs. 4,12,500/- together with interest at the rate of 12% p.a. from the date of the petition and costs in proportion. The Insurance Company has therefore preferred First Appeal No. 318 of 2000 calling in question the legality & validity of the award passed.

5. It is the first & foremost contention of the learned advocates for the appellants that both the drivers losing their lives were the employees of their masters the insured, and in the discharge of their duties assigned by the insured when they met with the motor accident, the victims who are their heirs ought to have filed the claim petitions under the Workmen's Compensation Act and not under the Act. The contention is not acceptable.

6. Under more than one Acts in force, if the party has the remedy for his claim arising out of the same cause of action and separate Forums for the same are constituted under different Acts he has to prefer the permissible remedial measures, and if the option is to be exercised, he is free to opt for the remedy out of more than one available under different Acts. Section 163-A starts with non-obstante clause and refers both, the Act

and Workmen's Compensation Act, 1963. As per Section 163-A notwithstanding any thing contained in the Act or in any other law for the time being in force, the owner and insurer of the motor vehicle are made liable to pay the compensation as per the structured formula given in Second Schedule. The words "in any other law for the time being in force" in their sweep certainly cover the Workmen's Compensation Act 1923. Sec. 163-A therefore permits the employee who is the victim of motor accident in the discharge of his duty or his heirs to claim compensation despite the fact that likewise remedy is available under Workmen's Compensation Act, 1923. The employee has his remedy under both the Acts namely M.V. Act and Workmen's Compensation Act. We shall now refer Sec. 167 which clarifies further course of action to be adopted. Sec. 167 of the Act in clear terms & unambiguously provides that without prejudice to the provisions of Chapter X (Sec. 140 to 144), it is open to the victim having the remedy for claim under both the Acts to exercise option either to file the claim petition in M.A.C. Tribunal constituted under the Act or before the Commissioner under the Workmen's Compensation Act, 1923. Sec. 163-A does not fall within Chapter X of the Act. The respondents victims having the right to claim under both the Acts were therefore free to make the choice. When they have as per their right opted to claim under the Act and thereby preferred to have permissible remedial measures available, they cannot be directed to prefer the claim before the Commissioner under Workmen's Compensation Act. To do so would be highly unjust, impropoer and illegal. The contention therefore fails.

7. Mr. P.V. Nanavati, the learned advocate representing the appellant, contends that in this case no petition under Section 166 of the Motor Vehicles Act is filed, with the result the insurance company did not get the chance to challenge the claim or putforth its case which it desired. When the appellant is thus deprived of the valuable right this appeal on that count may be admitted and allowed. It is also the contention that the provisions regarding the compensation introduced in Motor Vehicles Act, 1988 envisage fault liability, namely tortious liability. The concept of non-tortious liability is foreign to the Motor Vehicles Act, 1988. The tortfeasor therefore cannot take the advantage of the provisions of the Motor Vehicles Act and claim compensation.

8. The Motor Vehicles Act, 1939, contained the provision for the award of compensation on the principle of fault only. In Smt. Manjushri Raha And Others v.

B.L. Gupta And Others & B.L. Gupta Vs. Smt. Manjushri Raha And Others - (1977) 2 Supreme Court Cases 174 and in several other decisions rendered subsequently, the Supreme Court emphasised much about the provision to provide compensation on no fault liability because while dealing with several cases depicting hazards of vehicular accidents increasing alarmingly day by day and looking to the tragedy, plight, miseries & woes as well as helplessness of the victims, it found that the Act was lacking of necessary provision to help the victims, compelling the State to discharge its social obligation. As & when occasion arose, the Supreme Court went on reiterating the need for necessary change in the Act for providing compensation to the victims of motor accidents on the principle of no-fault also. The Law Commission of India also in its 85th Report recommended the introduction of the provision to award compensation on "no fault liability", the concept foreign to tortious liability. The Motor Vehicles Act of 1939 was then amended vide Motor Vehicles Amendment Act 1982 incorporating Section 92-A to 92-E so as to provide for the first time payment of compensation on the principle of no fault. Later on the Motor Vehicles Act, 1939, which was amended in 1982 was repealed and the new Act came into force with effect from 14th October 1988. In the new Act, Sections 140 to 144 corresponding to Sections 92-A to 92-E under the repealed Act were enacted. The Act also provided for the compensation resulting from an accident arising out of the use of the motor vehicle in three cases, namely, (1) hit and run motor accident (Section 161), (2) just compensation on the principle of fault liability (Section 166 to 168), and (3) compensation on the principle of no fault liability (Sections 140 to 144). The Act was again amended by the Amendment Act 54 of 1994 and the amended provisions came into force from 14th November 1994. Because of the amendment Section 163-A and Section 163-B have been introduced in Chapter XI so as to provide for payment of compensation in motor accident case on a pre-determined formula given in the Second Schedule. Section 163-A is titled as "special provision as to payment of compensation on structured formula basis", while Section 140 of the Act is captioned as Liability to pay compensation in certain cases on the principle of "no fault liability". As per Section 163-B, the option is given to the claimant to file the application for compensation either under Section 140 or under Section 163-A. Under Section 140, the amount of compensation to be awarded is fixed, i.e., Rs. 50,000/= in case of death, and Rs. 25,000/= in case of permanent disablement, whereas under Section 163-A the compensation

has to be awarded as per the Structured Formula in second schedule.

9. The historical background leading the Parliament to enact the provision of Section 163-A is, referring several decisions of the Supreme Court and commentaries of different learned authors on the Books on Tort, stated by this Court in the case of R.V. Chudasma Vs. H.B. Godala 1999(1) G.L.H. 278 = [1999 (1)] 40 (1) GLR 631. We, therefore, do not restate the same. Suffice it to say at this stage that the Government, because of the direction given and hope expressed by the Supreme Court and recommendation made by the Law Commission found that compensation on the ground of fault liability was not effectively assuaging the miseries, distress and woes being suffered by several victims of the motor accident as several victims had to retreat or feel dejected by losing the legal battle; and by passage of time when the concept of social obligation of the State to help the subject in case of need or exigencies in life developed which was also the voice echoed by the Supreme Court in several decisions referred to in the above referred case, the Parliament thought it fit to introduce necessary provision. With the result, Section 163-A came to be introduced expanding the frontiers of the liability and making the room for the principle of no-fault liability. It contemplates the principle of no-fault liability making the owner, driver and insurer of the vehicle or vehicles involved in the accident liable to pay the compensation on predetermined formula nevertheless fault-liability, and non-obstante clause by which Sec. 163-A begins indicates that regardless of other provisions in the Act about fault liability compensation to the victim shall be paid on the principle of no-fault. Section 163-A is therefore the provision based on no fault liability and not on tortious liability for the aforesaid object. In short, by introduction of Section 163-A, the ambit of liability under the Act is expanded covering non-tortious liability also.

10. This Court, in R.V. Chudasma's case (Supra), has with regard to liability on no-fault principle, made it clear that the application under Section 163-A is a substantial application for compensation under the two heads i.e. pecuniary and general damages only for which the ceiling is provided under Schedule II of the Act. If the general damages are to be claimed in excess of the amounts awardable under structured formula, or not covered by the said formula, a separate petition under Section 166 for full-fledged hearing and determination, has to be filed, otherwise not. In the said decision

different decisions of Apex Court throwing light on the history and object of introduction of Section 163-A are referred to. By passage of time pressing need to have a scheme for compensation to make the loss good at the earliest on adhoc basis without undergoing arduous long drawn procedure, u/s. 166 M.V. Act or meeting with any challenge or risk of losing fully or partly found necessary to be fulfilled, so that the victim may have some amount conclusively and irrevocably as solatium from the opposite parties viz, driver, owner and insurer of the vehicle involved in vehicular accident on ex-gratia-help-principle or adhoc basis arose, as a result of which Section 163-A by way of soothing provision came to be inserted. Under the said provision vide Sch. II "structured formula" for making payment of certain amounts on adhoc basis is provided. As per that formula without entering into the fault of any party or merits of the rival cases, ex-gratia payment on adhoc basis is to be finally made by the opposite parties. If the party claiming compensation is not satisfied with the amounts awardable under structured formula, it is for him to decide whether he should file the petition for compensation under section 166 and face the woven risk. He cannot be compelled to file the petition under section 166 of the Act. The provision therefore does not contemplate filing of another application under Section 166 and have compensation after meeting with the challenge of the opposite party. The opposite parties in other words have no right to challenge the claim under Section 163-A on any ground except on the ground of involvement of the vehicle or any limitation or grounds recognised by Section 163-A, namely income of the victim, deduction to be made, age, locus-standi, no insurance or cessation of insurance, ownership of vehicle, mode of assessment as per structured formula, and the like, or to seek the order directing the victim to prefer the application under Section 166 for full-fledged hearing. The provision of Section 163-A, to put differently makes the opposite parties liable to pay the lump-sum amount as ex-gratia payment to be calculated as per structured formula with no right to challenge on the grounds available in the petition filed under Section 166 of the Act; and payment under Section 163-A is not made subject to the inquiry contemplated under Section 166 of the Act. The appellant therefore cannot be allowed to lament on the ground that it does not get a right to challenge or defend putting forth a case it desires to, or contend that the application under Section 166 when not filed and ordered to pay under Section 163-A of the Act, its right to defend is jeopardised. In view of such law and position of Section 163-A, the compensation under no

fault liability on pre-determined formula has to be awarded and for such award of compensation, petition under Section 166 of the Act is not a condition precedent. Irrespective of one's own stand except permissible as aforesaid, the party liable has to pay as per predetermined formula u/s. 163-A of the Act so as to assuage the miseries and woes or distress of the victims of the motor accident. The contention raised in this regard therefore cannot sustain.

11. Mr. Nanavati, the learned advocate for the appellant, drawing our attention to the decision in the case of United India Insurance Co. Ltd. v. Jagatsinh Valsinh & Ors. - 27 (2) G.L.R. 1423 contends that the tortfeasor cannot take advantage of his own wrong and cannot claim damages for injuries sustained by him resulting from his own wrongful act. In the case on hand, deceased Vir Bahadur was himself driving the tanker and because of a wrong on his part i.e. his negligence, the incident happened and he died. The opponent No.1 mother of the deceased therefore cannot take the advantage of the wrong done by the deceased and claim compensation u/s 163-A of the Act also.

12. In the case cited this Court has, considering the provisions of Sections 95, 96 and 97 of the then Motor Vehicles Act, 1939, held that the claimant being a tortfeasor cannot claim compensation for the tortious act committed by him. In other words, it is held that if the claimant is found negligent he cannot come forward and say pay me the compensation for my own negligence. Such principle is beyond the purview of the Act. But this decision cannot be pressed into the services of the appellant because it is rendered qua the old provision. Section 163-A, the new provision about no fault liability, came to be introduced from 14-11-1994. When the decision was rendered by this Court on 14th October 1985, Sec. 163-A introducing the concept of no-fault liability was absent, and the principle to claim compensation on no-fault liability was foreign to the then Act in force. The decision rendered keeping old law in mind is, therefore, not applicable. Sec. 163-A has brought drastic change in the concept of tortious liability prevailing prior to it. It by non-obstante clause permits even the tortfeasor to claim compensation on the principle of no-fault liability which otherwise he is (if employee and has done wrong in the discharge of his duty) entitled to under Workmens' Compensation Act, 1923; or under the contract of insurance. The contention therefore fails. The Insurance Company who is the appellant can challenge the claim only on the ground of

no-contract at all i.e., no insurance, or on the abovestated grounds. It may be stated that it is not the case of the appellant that the vehicle in question was not insured with it or that the insurance was not in force at the time of accident.

13. The anxiety is also expressed in the next contention submitting what the insurance company should do if it is made liable to pay under Section 163-A though in fact it may not be liable to pay because the driver of the vehicle involved in the accident may not have the licence or might have driven the heavy vehicle though having the licence for a light vehicle, or what the insurance company should do if it is made liable to pay more under the pre-determined formula than the limits of the liability fixed in the policy because under Section 163-A insurance company will have no scope to challenge on such grounds, while under Section 166 if the petition is filed it will have the scope to challenge putting forth its defence and may avoid to pay more than its contractual liability otherwise a question of recovery may arise and insurance company will have to, if ordered to pay more, sustain loss.

14. Under the Act, the liability of the Insurance Company is statutory and that can be spelt out from Sec. 147. Charging extra premium, the Insurance Company may prefer to cover higher liability or risk or unlimited liability. In any case, therefore, the contractual liability will not be less than the statutory liability. It may be stated that by introduction of Sec. 163-A, the liability arising there under must now be deemed to have been covered under statutory liability regardless of the pecuniary limit in that regard is specified in policy, or premium charged. In other words, the limits of statutory liability should be deemed to have been extended or enlarged appropriately so as to cover the liability that arises under Sec. 163-A. For the said liability, extra premium is not to be charged or specific contract is not required to be entered into. When that is so, it cannot be said that the Insurance Company will have to pay more. However, in some cases, where third party does not come in picture if the Court directs the Insurance Company to pay more than its statutory or contractual liability, as the case may be, it would be open to the Insurance Company under the terms of the contract to recover, from the insured, the excess amount paid pursuant to the order or in execution and discharge of the order of the Court/Tribunal. In case the Insurance Company has to pay more than its liability or risk covered under the policy, to a third party, it can invoke

Sec. 147 & 149 (4) or (5) of the Act for the recovery of the amounts paid in excess of the liability. Regarding licence the scheme of the provisions of Sec.163-A does not provide a scope to raise a plea in defence so as to challenge the claim on the ground of no licence or category thereof being different because under Sec.163-A as stated earlier the sums on adhoc-basis under social obligation has to be paid notwithstanding other provisions. The contention therefore gains no ground to stand upon.

15. In this case, the heir of Vir Bahadur the respondent No.1 could have claimed the compensation preferring the petition before the Commissioner under Workmens' Compensation Act, 1923 as the remedy under that Act is also available. She may in order to have double gain prefer an application before the Commissioner after getting compensation under the Motor Vehicles Act. To curb such mischief this appeal may be admitted & allowed is the contention raised.

16. In order to check the mischief of double gain, or earning the premium the Parliament has in its wisdom enacted Section 167 which lays down that if the claimant has a right to claim compensation under both the Acts, namely Motor Vehicles Act and Workmens' Compensation Act, 1923, it would be open to him to claim the compensation under one of the two Acts and not under both. If the victim therefore prefers to claim the compensation under the Motor Vehicles Act, he will be debarred from claiming the compensation under the Workmens' Compensation Act, or if he claims under Workmens' Compensation Act, he will be debarred from claiming the compensation under the Motor Vehicles Act. In the case on hand, when the respondent No.1, the mother of the deceased has preferred to claim the compensation under the Motor Vehicles Act, she will be debarred from claiming the compensation under Workmens' Compensation Act, and if at all she prefers to claim, it will be open to the insurance company to challenge the claim invoking the Section 167 of the Motor Vehicles Act.

17. Faced with such situation Mr. Nanavati contends that even if the Insurance Company has to pay u/s. 163-A, it cannot be compelled to pay as per structured-formula. The victim was the employee of the insured and so whatever is awardable as per Table under Workmens' Compensation Act, 1923 which provides lesser amounts than under structured formula u/s. 163-A of the Act, can at the most be awarded. In other words, it is contended that if the worker, the victim of motor

accident, and in case of his death his heirs & representatives if claim the compensation u/s. 163-A of the Act, whatever is awardable under the Table under the Workmens' Compensation Act, 1923, should be awarded ignoring structured-formula because in that case the Table provided in Workman Compensation Act, 1923 will continue to govern the field and the structured-formula does not replace the Table.

18. The contention is misconceived. As stated above, Sec. 163-A starts with non-obstante clause, and refers both, the Act and Workmen's Compensation Act, 1923. As per Sec. 163-A notwithstanding anything contained in the Act, or in any other law for the time being in force, the owner and insurer of the vehicle are made liable to pay the compensation as per structured-formula given in Second Schedule. The words "in any other law for the time being in force" in their sweep certainly cover the Workmens' Compensation Act, 1923 and so these words clearly eliminate or brush aside the Table under Workmens' Compensation Act making it clear that the Table will not apply to the claim under Sec. 163-A of the Act even if the application is filed by the worker within the meaning of the Workmens' Compensation Act, 1923. The contention, that the claimant if happens to be the worker or worker's representatives are entitled to the amount of compensation as per the Table under Workmens' Compensation Act, 1923 only and not under the structured formula u/s. 163-A of the Act, therefore fails. To put in short in different words, the contention that when application is preferred in the M.A.C. Tribunal under the Act, the Tribunal is bound to assess the compensation under the Workmen's Compensation Act, does not seem to be just logical, judicious & rational.

19. Mr. P.V. Nanavati, has expressed the doubt about the identity of the respondent No.1 submitting that the respondent No.1 who is the claimant is in fact not the mother and giving a false address some one else had filed the petition and therefore the amounts if awarded would go to the wrong hand. In view of his such submission, we called the party in person before the Court and the learned advocate representing the respondent No.1 on the next date brought the respondent No.1 before the Court. Mr. Nanavati is now, after putting some queries, satisfied that the party claiming the compensation is genuine and there is no reason to doubt the identity.

20. It is the contention of Ms. Bhaya representing the appellant in First Appeal No. 318 of 2000 that all the tortfeasors are not joined. Consequently the

possibility of mischief on the part of the claimant for claiming the compensation again preferring the petition before another competent Tribunal against the tortfeasor not joined here, cannot be ruled out. The appeal on this count may therefore be dismissed. The contention cannot be accepted, in view of the decision rendered by this Court in the case of Gujarat State Road Transport Corporation Vs.Gurunath Shahu-1989(1)G.L.R.581 = 1989 (2) G.L.H.243=1989 A.C.J.314,wherein it is held that where there are more than one tortfeasors technically a claim petition against one of the tortfeasors is not bad, but it is desirable that the Tribunal will not adopt the easy course which may quickly dispose of the matter. Such disposal gives rise to other litigations. Therefore, whenever a plea for joining another joint-tortfeasor is raised and prayed for, it would be better for the Tribunal to insist that all the tortfeasors are brought on record. If the application for joining party is submitted, the Tribunal will have to allow such application and join another tortfeasor. In view of such decision, if one of the tortfeasors is left out, either of the parties can move the Tribunal for his joinder and in that case the Tribunal will have to allow the application and join the left-out-tortfeasor as the opponent so that there may not have any scope for fresh or more litigations, or a mischief on the part of the claimant for claiming the amount again, but if that is not done and for one or the another reason the tortfeasor is not joined and award is passed, the insurer or the party who is ordered to pay may when comes to know about application for compensation is filed against another tortfeasor for compensation, raise the dispute and bring it to the notice of the Tribunal about the earlier award having been passed; or if the claimant has obtained the amount more, keeping all in dark, he will in that case be directed to pay the amount back to the concerned party together with interest, as & when the mischief comes to be known.

21. On no other grounds, the submissions are made by either of the parties. For the aforesaid reasons, both the appeals fail and they merit dismissal. These two appeals in the result are accordingly dismissed at the admission stage.

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